

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JOHN BARANSKI AND JAMES  
LACOURTE, ON BEHALF OF  
THEMSELVES AND ALL OTHERS  
SIMILARLY SITUATED,

Plaintiffs,

v.

NCO FINANCIAL SYSTEMS, INC.,

Defendant.

CASE NO. 1:13-CV-6349-ILG-JMA

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO STRIKE**

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**I. INTRODUCTION**

Plaintiffs, John Baranski and James LaCourte, commenced this putative class action against defendant, NCO Financial Systems, Inc. (“NCO”), on November 15, 2013. ECF No. 1. NCO filed its motion to sever, dismiss, and/or transfer venue on December 11, 2013. ECF No. 6. The parties agreed to a briefing schedule that required plaintiffs opposition to the motions be filed by January 17, 2014. ECF No. 14, 18. Rather than respond to the issues and arguments in NCO’s motion to dismiss, plaintiffs filed an amended complaint on January 17, 2014, without seeking leave of court or NCO’s consent. ECF No. 21. Because plaintiffs amended complaint was not timely filed under Rule 15(a)(1)(B), it ought to be stricken.

## **II. LAW AND ARGUMENT**

Effective December 1, 2009, Fed. R. Civ. P. 15 was amended so as to treat a motion to dismiss filed under Rule 12(b)(6) in the same fashion as a responsive pleading is treated - the time to amend as a matter of course terminates 21 days after either the filing of a responsive pleading or a motion to dismiss under Rule 12(b). Fed. R. Civ. P.15(a)(1)(B). As amended, the Rule provides:

**(a) Amendments Before Trial.**

**(1) *Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

**(A)** 21 days after serving it, or

**(B)** if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

**(2) *Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

**(3) *Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

Fed. R. Civ. P. 15(a). The Advisory Committee Comments to the 2009 Amendment explain:

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a “pleading” as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

....

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period. . . .

Fed. R. Civ. P. 15, Advisory Committee Comments, 2009 Amendments (footnote omitted). The amendment was intended to promote efficient management of the court's docket. *Hayes v. District of Columbia*, 275 F.R.D. 343, 345-46 (D. D.C. July 29, 2011).

Here, plaintiffs' amended complaint was filed 37 days after NCO's motion to dismiss was filed, after the time for amending the complaint as a matter of course expired under Rule 15(a)(1)(B). Plaintiffs could not file their amended complaint on January 17, 2014 without leave of court. Fed. R. Civ. P. 15(a)(2).

As such, the amended complaint filed without leave of court is a nullity, has no legal effect, and ought to be stricken. 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1484 (3d ed. 2012) (“[i]f an amendment that cannot be made as of right is served without obtaining the court's leave or the opposing party's consent, it is without legal effect.”); *In re Crazy Eddie Securities Litigation*, 792 F.Supp. 197, 204 (E.D. N.Y. 1992) (amended complaint filed without leave has no legal effect); *Estate*

*of Rebecca Zahau v. Shacknai*, 2013 WL 6002944, \*1 (S.D. Cal. Nov. 12, 2013); *Dorsey v. Artus*, 2013 WL 5463720, \*3 (N.D. N.Y. 2013).

### **III. CONCLUSION**

For all the foregoing reasons, NCO Financial Systems, Inc. respectfully prays that the Court enter an Order striking plaintiffs' Amended Complaint (ECF No. 21) as untimely.

Respectfully Submitted

/s/ Michael D. Slodov

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